

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ATLANTIS INFORMATION TECHNOLOGY,
GmbH

Plaintiff,

-against-

CA, INC.

Defendant.
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Civil Action No.
06-CV-3921(JS)(WDW)

**DECLARATION OF
ALEXANDER GAUGLER IN
SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
DEFENDANT'S AFFIRMATIVE
DEFENSE AND
COUNTERCLAIM FOR BREACH
OF CONTRACT**

ALEXANDER GAUGLER, pursuant to 28 U.S.C. §1746, declares as follows:

1. I am the Managing Director of Plaintiff Atlantis Information Technology, GmbH ("Plaintiff" or "Atlantis"). I respectfully submit this declaration in support of Plaintiff's motion for partial summary judgment on Defendant CA, Inc.'s ("Defendant" or "CA") affirmative defense and counterclaim for breach of contract.

2. I make this declaration based on my personal knowledge and/or review of Atlantis's records and, if called as a witness, I would testify competently as to the matters contained herein.

3. Atlantis is a German corporation which has developed, licensed, maintained and supported a line of computer software programs sold under the name Endevor for Natural or "E/NAT" that run only on large mainframe computers (the "E/NAT Products" or "E/NAT").

4. The E/NAT products are software programs that provide an interface between a CA software product called Endevor and NATURAL/PREDICT software products made by a German company called Software AG. The E/NAT interface integrates the operation of the CA Endevor product with the operation of NATURAL (a programming language and software

development environment) and PREDICT (a data dictionary).

5. Atlantis developed the first E/NAT products in approximately 1993 in response to a request from one of its customers for a software solution that would allow the NATURAL and PREDICT software to be integrated into Endeavor.

6. By 1996, Atlantis had successfully developed the E/NAT software programs for general distribution to customers who were seeking to integrate the CA Endeavor product with their NATURAL and PREDICT product.

7. Until approximately June of 2007, when CA first made available its own replacement for E/NAT, E/NAT was the only commercially available software program that provided an interface between Endeavor and NATURAL.

8. Atlantis and CA entered into a Software License Agreement (the "SLA") dated as of February 28, 1997, pursuant to which Atlantis granted CA a license to use, market, distribute and sublicense the E/NAT products throughout the world. A true and correct copy of the SLA dated February 28, 1997 is attached hereto as **Exhibit A**.

9. Paragraph 2.4 of the SLA provides that:

"2.4 During the Term Supplier shall continuously enhance and update the Product to ensure that the Product supplied to CA will include: (i) all new releases and functionality made available to Supplier's other distributors or (direct) customers of the Product or any other comparable software products marketed by Supplier during the term of this Agreement; and (ii) all modifications necessary to support new versions of the CA software on the MVS Operating Environment. In the event that CA develops any bug fixes, maintenance releases or new versions of the CA Software [CA-Endevor on the MVS Operating Environment] during the Term of this Agreement, CA agrees to supply such bug fixes, maintenance releases and new versions to Supplier pursuant to the terms of Section 4.1 below."

See Exh. A hereto.

10. Paragraph 3.4 of the SLA provides that:

Supplier will notify CA in advance in writing of any plans to produce new, enhanced or modified versions of the Products or any replacements to the Product. Supplier agrees to offer to make all such, new, enhanced, modified or replacement Product available to CA subject to the provisions of this Agreement when the same are first made available to other licensees of the Product. Supplier also agrees, at no charge, to provide at least one master copy of any such updates to the Product (and permit CA to copy and update any old versions of the Product held in stock or used internally by CA or its Distributors). Supplier will continue to provide support for old or superseded versions of the Product for at least one year after release of the new or replacement Product.

See id.

11. On or before the commencement of the Term of the SLA in February, 1997, Atlantis provided CA with a copy of E/NAT version 2.1.0 which was the latest existing version of E/NAT at that time.

12. During the Term of the SLA, Atlantis provided CA with modifications and new subversions of E/NAT. A true and correct copy of the schedule of the modifications, enhancements and new sub-versions of E/NAT that were delivered by Atlantis to CA, which was provided to CA during discovery, is attached hereto as **Exhibit B**.

13. During the Term of the SLA, Atlantis provided CA with copies of all new releases and functionality of E/NAT that were made available to any other distributor or direct customer of E/NAT.

14. During the term of the SLA, Atlantis provided a copy of all new, enhanced, modified or replacement versions or sub-versions of E/NAT to CA on or before the date that they were first made available to any other licensees of E/NAT.

15. By letter dated May 29, 2007, CA notified Atlantis that it was terminating the SLA effective as of December 9, 2007. A true and correct copy of that termination notice is attached hereto as **Exhibit C**.

16. Pursuant to the terms of the SLA, Atlantis continued to provide maintenance and

support for E/NAT until on or after December 8, 2008.

17. E/NAT was designed to work with CA's Endeavor software program in a manner that allows the programmer to control NATURAL and PREDICT objects from within Endeavor and, in addition, to issue some actions from within the NATURAL programming environment.

18. According to CA, in July, 1998, CA released a new Application Programming Interface ("API") for Endeavor in version 3.8 of Endeavor. The Endeavor API allows the programmer using Endeavor to invoke Endeavor from within other software programs.

19. According to CA, the Endeavor API has existed and has been enhanced in subsequent releases of Endeavor since at least July 2000.

20. Since E/NAT was designed to be fully integrated into Endeavor, E/NAT does not invoke Endeavor through the Endeavor API like other third party programs that are used with Endeavor.

21. CA has known since at least July 1998 that E/NAT was not designed to invoke Endeavor through the Endeavor API.

22. Atlantis has never released any version of E/NAT that would invoke Endeavor through its API.

23. According to CA, in July 2000, CA enhanced Endeavor to make it possible to display selection lists for information and also to verify Endeavor requirements for execution of an action through the Endeavor API.

24. Since E/NAT was never designed to invoke the Endeavor API, E/NAT was never able to take advantage of the selection list and verification enhancements to the Endeavor Application Programming Interface – a fact CA has known or should have known since at least July 2000.

25. According to CA, in December 2002, CA enhanced the Endeavor API to allow it to retrieve a complete list of Packages and execution of Package Commands.

26. Since E/NAT was never designed to work with the Endeavor API, E/NAT does not retrieve a list of Packages and execute Package Commands through the Endeavor API – a fact CA has known or should have known since at least December 2002.

27. I understand that CA's Endeavor program has provided a QuickEdit option for users since at least 1996. The Endeavor QuickEdit option was designed for use with third generation programming languages like COBOL or PL/1 and not for working in the modern NATURAL software development environment.

28. Atlantis never provided the Endeavor QuickEdit functionality in E/NAT – a fact CA has known or should have known since at least July 1996.

29. According to CA, Endeavor 4.0 included a functionality that allowed Endeavor for the first time to store “long names” in its own data tables.

30. I understand that Endeavor 4.0 was released to the public in 2002 or earlier.

31. E/NAT was designed to store “long names” in data tables created specifically for E/NAT prior to the development of, and never made use of, the Endeavor “long names” tables – a fact CA has known or should have known since at least 1997.

32. E/NAT was never designed to provide online access to Endeavor via the Endeavor API (described by CA as “real-time processing”) that I understand was first released by CA in July 2002 – a fact CA has known or should have known since at least July 2002.

33. E/NAT was never designed to permit package shipment from within the NATURAL environment or to move packages without rebuilding the application – a fact CA has known or should have known since at least December 1998.

34. Atlantis has never released or distributed a version 3.0 of E/NAT.

35. CA knew at all times during the term of the SLA that Atlantis had not delivered a version 3 of E/NAT to CA.

36. I testified at my deposition that I “thought” that Atlantis ceased the development of a version 3.0 of E/NAT in 2002 or 2003, but I also testified that I “did not recall” the exact date and that the correct date “might be later.” See Exhibit F hereto, which is a true and correct copy of excerpts from my deposition in this matter, which was taken on January 24, 2008. My subsequent review of the business records of Atlantis revealed that the development of version 3.0 of E/NAT continued until on or shortly before the institution of this action by Atlantis for breach of contract in August 2006. See, e.g., Exhibit D hereto, which is a true and correct copy of an invoice from Impulsus GmbH to Atlantis for contracted work done by Impulsus GmbH on behalf of Atlantis in July 2006 for the development of version 3.0 of E.NAT.

37. From the execution of the SLA in February, 1997 until the termination of the SLA in December 2008, CA continued to sell or offer to sell E/NAT to its customers who used any version of Endeavor with the NATURAL programming language and/or PREDICT data dictionaries.

38. During the Term of the SLA, CA licensed customers to use the E/NAT software program and provided maintenance of the software to licensed customers.

39. During the Term of the SLA, Atlantis provided maintenance and support of the E/NAT program to CA and to CA’s customers who had licensed E/NAT.

40. CA reported and paid royalties to Atlantis on a quarterly basis commencing with the quarter ending March 31, 1997 through September 30, 2008. The last cumulative royalty report that CA sent to Atlantis was in November, 2008 for the quarter ending September 30,

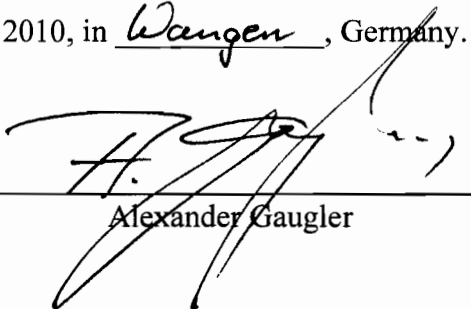
2008, a true and correct copy of which is attached hereto as **Exhibit E**.

41. From the execution of the SLA in February, 1997 until the termination of the SLA in December 2008, CA has reported sales to its customers of original E/NAT software licenses or E/NAT maintenance agreements of [REDACTED] of dollars. The majority of these sales occurred after CA released its first version of the Endeavor API in July, 1998. See Exhibit G hereto, which are true and correct copies of documents produced by CA in this litigation Bates-stamped CA 57716 – CA 57724, which CA has represented shows its allocation of fees it collected from its own customers that are attributable to E/NAT from 2004 through 2008, totaling approximately [REDACTED] dollars.

42. At no time prior to the filing of CA's motion to amend its answer on October 20, 2008 did CA claim that Atlantis had breached the SLA, or its amendments, by failing to provide a version 3 of E/NAT or by otherwise failing to enhance E/NAT.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed this 15 day of November, 2010, in Wangen, Germany.



Alexander Gaugler